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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

GERI A. TEVINI,

Plaintiff and Appellant,

v.

DOHERTY, GEORGESON, KERLEY,  
LLP et al.,

Defendants and Respondents.

A125341

(Marin County  
Super. Ct. No. CV 085767)

Appellant Geri Tevini retained respondents Doherty, Georgeson, Kerley, LLP, Francis Doherty and Suzanne Brown Crow, formerly doing business as JusVox, to sue her former employer. Following the entry of judgment in the employer's favor, she sued respondents for legal malpractice and related claims. Respondents demurred to appellant's second amended complaint on the grounds that her causes of action were barred by the statute of limitations. The court sustained the demurrer without leave to amend and denied appellant's motion for reconsideration. We affirm.

**FACTS AND PROCEDURE**

***I. Underlying Proceeding***

Tevini was suspended from her position at Novato Community Hospital (Hospital) in December 2000. She was later dismissed and sued the Hospital for wrongful termination. In November 2003, Tevini retained respondents to represent her.

Respondents appeared on Tevini's behalf at a jury trial scheduled for March 14, 2005. At trial, the court granted the Hospital's motion ordering Tevini to complete the

Hospital's grievance procedure. The final step of the procedure required that her claim be submitted to binding arbitration. The Honorable Harry Low conducted the arbitration and, on March 3, 2006, issued an arbitrator's decision, finding that Tevini had violated the Hospital's rules and was terminated for good cause. When Tevini learned of his decision, she orally fired respondent Doherty in the presence of the arbitration judge, opposing counsel, and other witnesses.

Acting in propria persona, Tevini contested the arbitration award. The award was confirmed and a judgment was granted in favor of the Hospital. Tevini appealed the judgment to this court contending that the arbitration award should be set aside. On March 26, 2007, the arbitration award and judgment of dismissal were affirmed. Thus, Tevini's litigation against the Hospital is over. We have no authority to revisit that final judgment.

## ***II. Tevini's Malpractice Actions Against Respondents***

On March 12, 2007, Tevini sued respondents accusing them of legal malpractice in the handling of her employment case. Respondents filed a cross-complaint alleging that Tevini breached her obligation to pay respondents' legal fees. On January 8, 2008, Tevini voluntarily dismissed this lawsuit.

On November 24, 2008, Tevini again sued respondents for malpractice. Her complaint alleged 16 causes of action. Causes of action one through eleven and thirteen through fifteen alleged that respondents or the trial judge committed assorted acts of malfeasance in connection with appellant's grievance proceeding or the arbitration, or that they had disqualifying conflicts of interest. Causes of action twelve and sixteen alleged actual fraud. The twelfth stated that respondents conspired to ensure that appellant would lose her case against the hospital, and the sixteenth accused respondents of conspiring to conceal conflicts of interest they shared with the trial judge because all of them belonged to the same Inn of Court club.

Respondents demurred to the complaint, in part, on the grounds that each cause of action was barred by the one-year statute of limitations provided in Code of Civil Procedure section 340.6.<sup>1</sup>

The court's tentative ruling sustained the demurrer without leave to amend as to all causes of action, except the twelfth and sixteenth. All those causes of action alleged that respondents breached their duty in providing Tevini legal services. The court determined that the allegations of the complaint "clearly and affirmatively" showed that Tevini was aware of the facts supporting her claims by the time she discharged her attorneys at the arbitration on March 15, 2006. Thus, all causes of action in the complaint filed in November 2008, except the twelfth and sixteenth, were barred by the statute of limitations.

The twelfth and sixteenth causes of action alleged conspiracy to commit fraud, and were based on claims of intentional concealment, willful deceit or actual fraud. Intentional fraud is an exception to section 340.6 and has a statute of limitation prescribed by section 338, subdivision (d) that runs for three years from discovery of the facts constituting the fraud. The court ordered supplemental briefing on this issue of "actual fraud."

After supplemental briefing, the court also sustained the demurrer to the twelfth cause of action without leave to amend explaining that "at best, these allegations plead legal malpractice at the arbitration hearing and not fraud or concealment of favorable evidence."

As to the sixteenth cause of action, which alleged that respondents willfully concealed conflicts of interest, the court found that Tevini had failed to plead with particularity the facts showing that respondents and Judge Smith engaged in improper behavior and that she suffered damage as a result. The court allowed Tevini to amend the sixteenth cause of action but warned her that unless she could sustain her burden to show

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<sup>1</sup> All further statutory references are to the Code of Civil Procedure.

a reasonable possibility that the defect could be corrected, the demurrer would be sustained without leave to amend.

On April 15, 2009, Tevini filed her amended sixteenth cause of action. On June 8, 2009, the court granted respondents' demurrer to the sixteenth cause of action without leave to amend and denied Tevini's motion for reconsideration as to the other 15 causes of action. The court found that Tevini failed to allege facts establishing all the elements of actual fraud. Therefore, her sixteenth cause of action was subject to the one-year statute of limitations. Notice of entry of order was filed June 8, 2009.<sup>2</sup>

On June 8, 2009, Tevini filed her notice of appeal.

## **DISCUSSION**

### ***I. Standard of Review***

"A general demurrer 'searches the complaint' for a failure to state a cause of action as a matter of law. [Citation.] On review from an order sustaining a general demurrer, ' "[w]e treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving

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<sup>2</sup> Tevini appealed from the April 14, 2009 order sustaining demurrers to the first through fifteenth causes of action without leave to amend. This court dismissed her appeal as premature because it was not from a final written order or judgment of dismissal. On August 5, 2009, in the interest of justice, this court reinstated Tevini's appeal and treats the original notice of appeal as having been filed immediately after the entry of the June 8, 2009, judgment.

such reasonable possibility is squarely on the plaintiff.’ ” (*Stanton Road Associates v. Pacific Employers Ins. Co.* (1995) 36 Cal.App.4th 333, 340-341.)

## **II. The Application of Section 340.6 to Tevini’s Claims**

Tevini contends the court erred when it applied the one-year limitation period for attorney malpractice provided in section 340.6 to her complaint. Section 340.6, subdivision (a) states in relevant part that, “[a]n action against an attorney for a wrongful act or omission, other than for actual fraud, arising in the performance of professional services shall be commenced within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first.”

“Under section 340.6, the one-year limitations period commences when the plaintiff actually or constructively discovers the facts of the wrongful act or omission, but the period is tolled until the plaintiff sustains actual injury. That is to say, the statute of limitations will not run during the time the plaintiff cannot bring a cause of action for damages from professional negligence. [¶] The test for actual injury under section 340.6, therefore, is whether the plaintiff has sustained any damages compensable in an action, other than one for actual fraud, against an attorney for a wrongful act or omission arising in the performance of professional services.” (*Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739, 751.)

The actual injury requirement is satisfied when a plaintiff suffers an adverse judgment or dismissal of the underlying action. (*Laird v. Blacker* (1992) 2 Cal.4th 606, 618-619.) The statute of limitation on a cause of action for legal malpractice is not tolled by the filing of an appeal in the underlying case, or a party’s dismissal of a lawsuit without prejudice, and such a dismissal under the statute of limitations is a risk that a plaintiff takes. (*Ibid.*; §340.6, subd. (a).)

“It is the occurrence of some . . . cognizable event rather than knowledge of its legal significance that starts the running of the statute of limitations.” (*McGee v. Weinberg* (1979) 97 Cal.App.3d 798, 804.) On the face of the complaint it is apparent

that Tevini was aware of the facts supporting her allegations by the time she discharged respondents at the conclusion of the arbitration proceedings on March 15, 2006. As of that date, Tevini suffered actual harm as a result of an adverse judgment in her arbitration and the statute of limitations began to run.<sup>3</sup> (§ 340.6; *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison, supra*, 18 Cal.4th at pp. 751-752.) Thus, on November 24, 2008, when Tevini filed her second malpractice complaint against respondents it was untimely.

It makes no difference that Tevini described her causes of action as something other than legal malpractice. “ “ “To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the ‘gravamen’ of the cause of action. . . . ‘[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.’ . . . ” [Citations.] ‘What is significant for statute of limitations purposes is the primary interest invaded by defendant’s wrongful conduct.’ ” (*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1153.) Courts have held that the one-year statute of limitations under section 340.6, subdivision (a), governs claims for breach of fiduciary duty, negligent misrepresentation, and breach of contract when those claims arise from the provision of legal services. (*Quintilliani v. Mannerino* (1998) 62 Cal.App.4th 54, 68, 69; *Curtis v. Kellogg & Andelson* (1999) 73 Cal.App.4th 492, 503; *Leasequip, Inc. v. Dapeer* (2002) 103 Cal.App.4th 394, 401.)

The one-year statute of limitations applies to all claims based on the provision of legal services except actual fraud. Therefore the trial court properly found that section

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<sup>3</sup> Tevini argues that the statute of limitations was tolled because she was unaware of a favorable June 18, 2004, arbitration decision in her action against the Hospital. No matter. The Hospital rejected the 2004 arbitration award on June 23, 2004. It was non-binding and superseded by proceedings that ensued after the Hospital’s request for a trial de novo. Tevini was present and participated in the ensuing proceedings and aware of the status of her case. While Tevini wanted to keep the result obtained in that arbitration, it wasn’t hers to keep and was summarily rejected by the Hospital. (§ 1141.20, subd. (b).)

340.6 applied to Tevini's first cause of action for an illegal contract; second cause of action for breach of fiduciary duty; third, fourth, fifth, sixth, seventh, tenth, eleventh, and fourteenth causes of action for breach of contract; eighth cause of action for bad faith and violation of California Rules of Professional Conduct; ninth cause of action for withholding evidence in violation of public policy; thirteenth cause of action for violation of antitrust law; and fifteenth cause of action for a civil rights violation under the RICO Act.

### **III. *Tevini's Failure to Properly Plead Fraud***

The court determined that Tevini's twelfth and sixteenth causes of action were subject to the three-year statute of limitations under section 338, subdivision (d), that governs allegations for conspiracy to commit fraud. But, Tevini failed to properly plead her fraud claims and the trial court properly sustained respondents' demurrer without leave to amend. Therefore, the twelfth and sixteenth causes of action are also barred.

"The elements which must be pleaded to plead a fraud claim are '(a) misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of falsity (or "scienter"); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Agricultural Ins. Co. v. Superior Court* (1999) 70 Cal.App.4th 385, 402.)

"[F]raud must be pled specifically; general and conclusory allegations do not suffice." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.) "The effect of this rule is twofold: (1) General pleading of the legal conclusion of 'fraud' is insufficient; the facts constituting the fraud must be alleged; and (2) Every element of the cause of action for fraud must be alleged in the proper manner (i.e., factually and specifically), and the policy of liberal construction of the pleadings . . . will not ordinarily be invoked to sustain a pleading defective in any material respect." (5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 711, p. 127; *Committee on Children's Television, Inc. v. General Foods Corp.* (1983) 35 Cal.3d 197, 216.)

" 'This particularity requirement necessitates pleading *facts* which "show how, when, where, to whom, and by what means the representations were tendered." ' "

(*Lazar v. Superior Court*, *supra*, 12 Cal.4th at p. 645.) Further, alleging constructive fraud resulting from negligent misrepresentation is not enough to plead around the one-year statute of limitation for legal malpractice. (*Quintilliani v. Mannerino*, *supra*, 62 Cal.App.4th at pp. 69-70.) “The plaintiff must allege the specifics of his or her reliance on the misrepresentation to show a bona fide claim of actual reliance.” (*Cadlo v. Owens-Illinois, Inc.* (2004) 125 Cal.App.4th 513, 519.)

Tevini alleged, in her twelfth cause of action for conspiracy to commit fraud, that respondents: (1) failed to call witnesses at her arbitration hearing; (2) only called three character witness at the hearing; (3) did not have a reporter at the hearing; (4) subpoenaed a hostile witness but, the witness did not attend the hearing; (5) did not object to Tevini’s husband being subpoenaed as a witness by the Hospital; (6) did not allow Tevini’s husband into the hearing; (7) allowed inadmissible evidence into the hearing; and (8) allowed Hospital employees to perjure themselves at the hearing.

Tevini alleged in her sixteenth cause of action for conspiracy to commit fraud that respondents: (1) withheld potential conflicts of interest concerning Judge Smith; (2) billed Tevini during this time for legal fees; (3) were members of the same legal professional organization as Judge Smith; (4) moved their office location after losing Tevini’s lawsuit; (5) knew that one or more members of the Hospital’s management lied under oath; and (6) failed to provide Tevini with prompt notice of settlement.

Tevini failed to plead facts in her twelfth and sixteenth causes of actions that are required to prove fraud. On the twelfth cause of action, the trial court properly found that Tevini’s allegation that respondents committed willful deceit by not introducing certain evidence was nothing more than malpractice in the arbitration proceeding. There are no facts to support a finding of fraud or concealment as to the twelfth cause of action.

Similarly, Tevini’s sixteenth cause of action alleging concealment of conflicts of interest constituting fraud amounts to no more than a pleading of legal conclusions and disassociated facts. Tevini fails to plead facts to show that the respondents and Judge Smith conspired to engage in deceit and that she suffered actual damages as a result of such a conspiracy.



Tevini’s complaint does not allege facts to demonstrate the necessary elements of fraud; “ ‘(a) misrepresentation (false representation, concealment or nondisclosure); (b) knowledge of falsity (or “scienter”); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage,’ ” could possibly be proven in this case. (*Agricultural Ins. Co. v. Superior Court*, *supra*, 70 Cal.App.4th at p. 402.) Therefore, the court correctly ruled that the twelfth and sixteenth causes of action were time-barred under the general one-year statute that applies to legal malpractice claims, section 340.6.

### **DISPOSITION**

The judgment is affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.